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# Security Council

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## Letter dated 28 September 2000 from the Secretary-General addressed to the President of the Security Council

I am transmitting to you herewith for consideration, and for consideration by the members of the Security Council, a letter dated 26 September 2000 addressed to me by Judge Navanethem Pillay, President of the International Criminal Tribunal for Rwanda.

In his letter, Judge Pillay indicates that, according to the Judges of the International Criminal Tribunal for Rwanda, the Tribunal should be able, in certain situations, to compensate persons who may have been wrongfully detained, prosecuted or convicted by the Tribunal.

You will remember that, in my letter dated 26 September 2000 (S/2000/904), I drew to your attention and to the attention of the members of the Security Council, a letter dated 19 September 2000 from Judge Claude Jorda, President of the International Tribunal for the Former Yugoslavia, concerning the same proposal.

Judge Pillay notes that, according to the Judges, there are three situations in which the Tribunal should be able to award such compensation.

The first situation arises when a person has suffered punishment as a result of a final decision of the International Tribunal and that decision is subsequently reversed by the Tribunal, or a pardon is granted, because a new or newly discovered fact proves that there has been a miscarriage of justice.

The second situation arises when a person who has been detained under the Tribunal's authority is subsequently acquitted by a final decision of the Tribunal or is subsequently released following a decision to terminate the proceedings against him/her in circumstances which show conclusively that there has been a grave and manifest miscarriage of justice.

The third situation in which, according to the Judges, the Tribunal should be able to award compensation arises when a person is arrested or detained under the Tribunal's authority in a manner or in circumstances which constitute a violation of the right to liberty and security of person and when the conduct which gave rise to the violation is legally imputed to the Tribunal and thus to the United Nations.

Judge Pillay observes that, in the first and third situations, the United Nations is required, under generally accepted human rights norms, to compensate the individual who has been unlawfully convicted, arrested or detained.

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Judge Pillay also observes that in neither of these two situations could the United Nations fulfil its legal obligations simply by paying a sum of money as compensation to the individual concerned. Legal provisions must be enacted which would give the individual a specific right to compensation, determine how the compensation to be paid must be calculated and establish a procedure for this purpose which meets the essential requirements of legality and respect for law.

Judge Pillay observes that, in the second situation described in his letter, the United Nations could not be held bound under existing international law to compensate an individual who may have been unlawfully detained or prosecuted as described. He states that the Judges nevertheless believe that, given the particular circumstances in which the Tribunal operates, it is desirable that the Tribunal should be able to award compensation in such situations.

Judge Pillay notes that, for the Tribunal to be able to award compensation in each of the three situations described in his letter, the Security Council would have to amend the Statute of the International Criminal Tribunal for Rwanda to empower it to deal with questions of compensation.

Should the Security Council adopt such amendments, the General Assembly would subsequently have to approve the necessary appropriation to the Tribunal's budget.

I should be grateful if you would bring the text of this letter and its annexes to the attention of the members of the Security Council.

(*Signed*) Kofi A. **Annan**

# Annex

[Original: English]

## Letter dated 26 September 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General

The Judges of the International Criminal Tribunal for Rwanda have requested me to address this letter to you explaining that they consider it desirable that the Statute of the Tribunal be amended to provide for compensation to persons wrongly prosecuted or convicted.

Neither the Statute nor the Rules of Procedure and Evidence of the Tribunal provide remedies for deprivation of liberty, consequent upon wrongful arrest, prosecution or conviction or unlawful violations of rights. The right to such remedy is embodied in various international human rights instruments. The Judges are interested in having the International Criminal Tribunal for Rwanda placed in a position to fully respect internationally recognized obligations.

During the past five years, three instances of deprivation of liberty occurred in the International Criminal Tribunal for Rwanda which caused concern for the Registrar: a wrongful arrest upon mistaken identity; the withdrawal of a prosecution against an individual who had voluntarily surrendered to the Tribunal and whose status is still being determined by the host country; and an order by the Appeal Chamber in case ICTR-97-AR72 that, on the grounds of violation of his rights during arrest and pre-trial detention, the appellant in the case was entitled to a remedy in the form of financial compensation, if he is found not guilty, and a reduced sentence, if he is convicted.

### Awarding compensation to wrongly convicted persons

The right of wrongly convicted persons to receive compensation is set forth in various international human rights instruments, including article 14, paragraph 6, of the International Covenant on Civil and Political Rights. An almost identical provision to article 14, paragraph 6, is also found in article 85 of the Statute of the International Criminal Court, adopted at Rome on 17 July 1998.

Acts of the International Criminal Tribunal for Rwanda, a subsidiary organ of the Security Council, are imputable to the United Nations. Consequently, since it considers itself bound by generally accepted norms of human rights law such as article 14, paragraph 6, of the International Covenant on Civil and Political Rights, the United Nations would be under an obligation to ensure that compensation is paid to a person whose conviction by the International Criminal Tribunal for Rwanda has later been reversed.

### Awarding compensation to wrongly prosecuted persons

Although article 85, paragraph 3, of the Rome Statute will enable the future International Criminal Court to award compensation in exceptional circumstances to accused who are acquitted or have the proceedings against them terminated on account of a grave and manifest miscarriage of justice, equivalent provisions do not appear in the International Covenant on Civil and Political Rights or in any other

international human rights instrument. It cannot, therefore, be said that a right of this type currently forms part of customary international law. Accordingly, the United Nations cannot be said to be under an unambiguous legal obligation to pay compensation to a victim of a miscarriage of justice in such circumstances.

Nevertheless, provisions for the compensation of an accused who has in some way been wrongly prosecuted do exist in some national systems.

In view of the circumstances under which the International Criminal Tribunal for Rwanda operates — in particular, the fact that accused persons are held in pre-trial detention for long periods — it would therefore be in the interest of the Tribunal, and of the United Nations in general, that compensation be awarded, at the discretion of the Tribunal, to accused persons who are acquitted or have the proceedings against them discontinued. It should be noted, however, that such discretion should only be exercised in exceptional circumstances where there has been a "grave and manifest" miscarriage of justice.

**Awarding compensation to unlawfully detained persons**

International human rights treaties guarantee to persons who may be deprived of their liberty in circumstances or in a manner that involves a violation of their rights, the right to receive compensation; see for instance article 9, paragraph 5, of the International Covenant on Civil and Political Rights. Consequently, should a person be arrested or detained on the authority of the International Criminal Tribunal for Rwanda in a manner or in circumstances that are in violation of the rights recognized in paragraphs 1 to 4 of article 9 of the Covenant and should the conduct which gave rise to that violation be such as to be deemed in law to be that of the International Criminal Tribunal for Rwanda, and so be imputable to the United Nations, the Organization would be under an international obligation to ensure that the victim of that violation was compensated.

Please note that, since the Statute does not contain any provisions conferring on the International Criminal Tribunal for Rwanda the authority to take the necessary steps to ensure the discharge of the aforementioned obligations, various possible mechanisms have been examined, in consultation with the Office of Legal Affairs, which would nonetheless enable such persons to obtain compensation. Such mechanisms include, inter alia, arbitration, ex gratia payment, resolutions of the General Assembly authorizing limited liability and amendment of the Statute of the International Criminal Tribunal for Rwanda.

In this connection, it is essential to note that the United Nations would not be able to comply with its international obligations simply by paying the individuals concerned an appropriate sum in compensation. The obligations which are codified within article 9, paragraph 5, and article 14, paragraph 6, of the International Covenant on Civil and Political Rights are not simply to ensure that persons whose cases fall within the scope of these provisions are compensated *simpliciter*, but rather to guarantee that they are vested with "an enforceable right to compensation" (in the case of article 9 (5)) and are compensated "according to the law" (in the case of article 14 (6)). It is therefore necessary, in order to discharge this obligation, that there exist rules of law, satisfying the basic requirements of legality and due process, that confer on persons wrongly prosecuted or convicted by the International Criminal Tribunal for Rwanda, as well as those who were unlawfully arrested or detained under its authority, a specific legal right to be paid compensation.

Accordingly, since the International Criminal Tribunal for Rwanda and, in particular, the Chambers, are in the best position to determine whether wrongly prosecuted or convicted persons as well as those who are unlawfully arrested or detained should receive compensation, the Judges are of the view that the Security Council should consider widening the scope of the jurisdiction of the International Criminal Tribunal for Rwanda through a statutory amendment, conferring upon it competence to deal with cases of compensation.

Given that any steps taken in this regard should closely reflect recent developments of international human rights law, it is suggested that a new article should be inserted into the Statute of the International Criminal Tribunal for Rwanda modelled on the precedent afforded by article 85 of the Rome Statute of the International Criminal Court, the text of which is attached for ease of reference (see appendix).

Finally, with a view to seeking the most appropriate amendment to the Statute of the International Criminal Tribunal for Rwanda, I would kindly ask you to transmit this letter to the President of the Security Council for his consideration and that of the members of the Council.

Since it is axiomatic that the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia take similar approaches to this issue, I have discussed the issue of compensation with Judge Claude Jorda, President of the International Tribunal for the Former Yugoslavia, who has informed me that the Judges of that Tribunal also envisage proceeding in this manner with a view to securing the amendment to the Statute of that Tribunal and that a separate letter to this effect has been addressed to you.

Should you have any questions regarding this request, or wish to obtain further information on the right wrongly prosecuted or convicted persons as well as that of unlawfully arrested or detained persons to receive compensation, please do not hesitate to contact me.

(*Signed*) Navanethem **Pillay**
President

# Appendix

## Article 85 of the Rome Statute of the International Criminal Court

### Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.